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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RASHAD DEKEVIN DAVIS,

Defendant and Appellant.

E070029

(Super.Ct.No. INF1301544)

OPINION

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge.

Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

On June 19, 2013, a complaint charged defendant and appellant Rashad Dekevin Davis with transportation of marijuana for sale, a felony, under Health and Safety Code section 11360, subdivision (a) (count 1); possession of marijuana for sale, a felony, under Health and Safety Code section 11359 (count 2); and resisting a public officer, a misdemeanor, under Penal Code section 148, subdivision (a) (count 3). As to counts 1 and 2, the complaint also alleged that defendant committed the offenses for the benefit of, at the direction of, and in association with a criminal street gang, the Gateway Posse Crips, with the specific intent to promote, further and assist in any criminal conduct by gang members, within the meaning of Penal Code section 186.22, subdivision (b)(1)(A).

On April 1, 2015, defendant pled guilty to transportation of marijuana for sale (count 1), and possession of marijuana for sale (count 2). He also admitted that he committed both crimes for the benefit of a criminal street gang. Because the sentence in this case was part of an aggregate sentence imposed on three cases, the trial court sentenced defendant to a total sentence of two years eight months as follows: (1) one-third the midterm, one year, for count 1; (2) one-third the midterm, eight months, for count 2; and (3) one year for the gang enhancement. The court ordered this sentence to be served consecutive to the sentences imposed in case Nos. INF1400301 and INF1400271. The total sentence imposed on all three cases was 14 years four months. The trial court then struck the gang enhancement on count 2.

On February 3, 2017, defendant filed a petition under Health and Safety Code section 11361.8, subdivision (b), Proposition 64, to reduce his sentence on count 1 (the Petition). On February 8, 2017, the People alleged that defendant was actually seeking resentencing on both counts 1 and 2, and requested a hearing to determine whether defendant posed an unreasonable risk of danger to public safety. Both parties filed additional documents in support of their respective positions. On February 8, 2018, the trial court found that defendant posed an unreasonable risk of danger to public safety and denied the Petition.

On February 23, 2018, defendant filed a timely notice of appeal.

B. FACTUAL HISTORY

Defendant admitted that on June 14, 2013, he possessed and transported marijuana for sale. He also admitted that he committed the crimes for the benefit of the Gateway Posse Crips, a criminal street gang, in which he was an active participant.

DISCUSSION

On appeal, defendant contends that he is entitled to a new hearing because the trial court abused its discretion in denying the Petition when the court found defendant to be an unreasonable risk of danger to public safety within the meaning of Health and Safety Code section 11361.8.

On November 8, 2016, California voters passed Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act, which amended Health and Safety Code section 11359 to provide that “[e]very person 18 years of age or over who possesses cannabis for sale shall be punished by imprisonment in a county jail for a period of not

more than six months or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment.” (Health & Saf. Code, § 11359, subd. (d).)

Proposition 64, which became effective November 9, 2016, allows a “person currently serving a sentence for a conviction” of specified marijuana-related crimes to petition the superior court to recall the prisoner’s sentence and resentence them according to the amended statute. (Health & Saf. Code, § 11361.8, subd. (a).) “If an inmate files such a petition and satisfies the statutory criteria for relief, ‘the court shall grant the petition . . . unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety.’ ” (*People v. Rascon* (2017) 10 Cal.App.5th 388, 393.)

Health and Safety Code section 11361.8, subdivision (b), provides that if the party opposing a petition for resentencing does not prove that the petitioner does not satisfy the criteria listed in subdivision (a), a court must grant a petition, unless it determines that the petitioner would pose an unreasonable risk of danger to public safety. “ ‘[U]nreasonable risk of danger to public safety’ ” is defined as “an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [Penal Code section 667, subdivision (e)(2)(C)(iv).]” (Pen. Code, § 1170.18, subd. (c).) These felonies, or super strikes, include sexually violent offenses, as defined in Welfare and Institutions Code section 6600, oral copulation and lewd or lascivious acts with a child under 14 years old, homicide or attempted homicide, assault with a machine gun on a peace officer, and any serious and/or violent felony offense punishable in California by life imprisonment or death. (Pen. Code, § 667, subd. (e)(2)(C)(iv).) In exercising its discretion, the court may consider evidence provided for in Penal code section 1170.18, subdivision (b). (Health &

Saf. Code, § 11361.8, subd. (b).) Such evidence includes the petitioner’s criminal conviction history, including the types of crimes committed, the extent of injuries to the victims, the length of prior prison commitments, and the remoteness of the crimes; as well as the petitioner’s disciplinary record and record of rehabilitation while incarcerated. (Pen. Code, § 1170.18, subd. (b).)

The prosecution must prove an unreasonable risk of danger to public safety by a preponderance of the evidence. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1305 [same standard in Proposition 36 proven by preponderance of evidence].) The trial court’s denial of a petition for resentencing on dangerousness grounds is reviewed for abuse of discretion. (*People v. Esparza* (2015) 242 Cal.App.4th 726, 744-745.) The court abuses its discretion when factual findings critical to its decision find no support in the record. (*Id.* at p. 745.)

In this case, the trial court based its denial of the Petition on its finding that it was “very likely that [defendant] could commit a super strike.” We find that the trial court did not abuse its discretion in making this finding.

In the People’s opposition to the Petition, the People argued that defendant posed an unreasonable risk of danger to public safety because of his past convictions:

(1) 2006—negligent discharge of a firearm under Penal Code section 246.3; (2) 2009—resisting arrest under Penal Code section 148, subdivision (a)(1); (3) 2015—accessory after the fact under Penal Code section 32; and (4) 2015—assault with a firearm with a gang enhancement under Penal Code sections 245, subdivision (a)(2) and 186.22,

subdivision (b)(1)(B).¹ The People also listed defendant's multiple rules violations in prison. The opposition further noted defendant's admission to being a member of the Gateway Posse Crips while he was in prison. With regard to the accessory after the fact conviction under Penal Code section 32, the People explained that in December 2013, a Gateway Posse Crips gang member fired several rounds into the air with a rifle.

Defendant collected the expended casings and later refused to cooperate when law enforcement asked where he put the casings and why he had picked them up. With regard to the assault with a firearm conviction, the People explained that in January of 2014, defendant and another Gateway Posse Crips gang member confronted the victim and asked "where he was from." When the victim told them it was none of their business, Defendant punched the victim in the face. The victim attempted to defend himself and the codefendant "brandished a handgun from his waistband." As the victim got into his car with his passenger and started to flee, the codefendant pointed his gun at the fleeing vehicle and fired two to seven rounds.

On February 8, 2018, at the hearing on the Petition, the trial court noted that the 2014 incident was fairly recent, and further commented, "Let's be honest, we're talking about 2014, in which he is involved in this serious assault with a weapon. He is not the person with the weapon. He is still involved in the gang assault with a weapon." The court went on to note that defendant "was involved in a 32 or pled to a 32 where a gun

¹ On April 1, 2015, after the commencement of the preliminary hearing in the assault with a firearm case, defendant pled guilty to that case; pled guilty in the separate accessory after the fact case; and pled guilty in the current case. The trial court imposed a total combined sentence of 14 years four months.

was involved, but he was an accessory after the fact in that incident. Again, I believe it to be a gang-related incident.” Thereafter, the court stated: “We’re talking about very recent incidents here. If you’re an active gang member who is involved with guns and other gang members and committing crimes, it is very likely that he could commit a super strike offense. [¶] I would deny the request at this time based on the Court’s review of the information that was provided and also having reviewed both briefs in this matter.”

Therefore, the court here based its denial of the Petition on defendant’s criminal conviction history, which was a proper consideration. (Health & Saf. Code, § 11361.8, subd. (b); Pen. Code, § 1170.18, subd. (b).) We note that defendant “bears the burden to provide a record on appeal which affirmatively shows that there was an error below, and any uncertainty in the record must be resolved against the defendant.” (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 548.)

Defendant, however, contends that the trial court’s finding is not supported by substantial evidence because: (1) “punching a rival gang member in the face is not a super strike”; (2) he has not been convicted of a violent felony; (3) he never fired the shots in the air; and (4) “most importantly, no one was injured as a result of these fellow gang members, not [defendant] discharging a firearm.” Defendant’s argument is without merit because the statute provides that the Petition can be denied if there is “an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [Penal Code section 667, subdivision (e)(2)(C)(iv).]” (Pen. Code, § 1170.18, subd. (c).) Here, even though none of defendant’s past crimes involved a super strike, defendant’s active membership in a gang, coupled with multiple crimes involving guns,

supports a finding that there is an unreasonable risk that defendant will commit a new violent felony.

Moreover, defendant argues that he is unlikely to commit a super strike because he will be in prison for a total of 14 years four months. Defendant contends that he “would not be released from prison for at least another seven or eight years. He will be well into his 30s by the time of his release.” In *People v. Williams* (2018) 19 Cal.App.5th 1057, which involved a Proposition 36 matter, the appellate court concluded that the trial court erred when it found a 53-year-old defendant, with no gang affiliation, to be an unreasonable risk of danger to public safety without considering his indeterminate sentence of 193 years to life; the defendant would not be released until the age of 77. (*Id.* at pp. 1059-1064.) The instant case is different. If defendant were released in his 30s, there is nothing to indicate that he could not commit a super strike based on his criminal history and gang affiliation.

Furthermore, defendant contends that the trial court erred in denying the Petition because “[m]ere membership in a street gang, without more, does no[t] satisfy the People’s burden of proving that [defendant] posed an ‘unreasonable risk of danger to the public’ by a preponderance of the evidence.” Defendant’s argument, however, is without merit because there *was more* than mere membership in a street gang. Defendant was not simply a member of the Gateway Posse Crips gang. In fact, he was an active participant in the crimes that were committed for the furtherance of and benefit of the Gateway Posse Crips gang.

In view of the record, we conclude that the trial court did not abuse its discretion in finding that defendant was an unreasonable risk of danger to public safety. The court, therefore, properly denied the Petition.

DISPOSITION

The judgment is affirmed.

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MILLER
Acting P. J.

We concur:

SLOUGH
J.

MENETREZ
J.